



January 22, 2002

Mr. Jefferson B. Davis
County Attorney
Nacogdoches County
101 West Main Street, Room 218
Nacogdoches, Texas 75961

OR2002-0312

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157597.

Nacogdoches County (the "county") received a request for "any and all records reflecting payments made by [the county] to the law firm Flowers, Davis and/or attorney Robert Davis in Tyler, Texas during the year 2001," and "any requests for authorization of payment signed by any person authorized to make such requests, any warrants, any invoices, and any approvals for payment. . . ." You state that the county has released some responsive information to the requestor. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, as well as under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.¹ We have considered the exceptions you claim and reviewed the submitted information.

We next observe that section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government

¹Although you argue that information is protected under the attorney-client privilege pursuant to section 552.101 of the Government Code, which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," the attorney-client privilege is recognized under section 552.107. *See* Open Records Decision No. 574 (1990). Thus, we address your attorney-client privilege argument under section 552.107.

Code, unless they are expressly confidential under other law. In pertinent part this section reads

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege;

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(16), (17). The submitted information includes documents that are subject to sections 552.022(a)(16) and 552.022(a)(17). These documents must therefore be released under section 552.022 unless the information is expressly made confidential under other law. Sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive section 552.107(1)), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Accordingly, we do not address your claims regarding these exceptions to disclosure with respect to the documents that are subject to section 552.022(a) of the Government Code.

However, you also argue that a portion of the submitted information is confidential under the attorney-client privilege. The attorney-client privilege is found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 503.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ).

After reviewing your arguments and the submitted documents that are subject to section 552.022(a), we find that you have demonstrated that some of the entries contained within the submitted attorney fee bills constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. We have marked the information in the submitted attorney fee bills that the county may withhold from disclosure pursuant to Rule 503.

You also claim that a portion of the remaining submitted information that is subject to section 552.022(a) is excepted from disclosure as attorney work product. The attorney work product privilege is found in Rule 192.5 of the Texas Rules of Civil Procedure. Thus, we will determine whether any of this information is confidential under Rule 192.5.

An attorney's core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's

representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ).

After reviewing your arguments and the remaining submitted information that is subject to section 552.022(a), we find that you have demonstrated that some of the entries contained within the submitted attorney fee bills constitute attorney core work product. We have marked the entries within the attorney fee bills that the county may withhold pursuant to Rule 192.5.

We next address your arguments regarding disclosure of the remaining submitted information that is not subject to section 552.022(a). The information at issue consists of documents pertaining to the District Court Docket Report. The information appears to have been obtained from the internet. These documents, submitted as Exhibit D12, may not be withheld from public disclosure under section 552.103, since the documents already exist in the public domain by virtue of their publication on the internet.

You further argue that section 552.107(1) of the Government Code excepts the documents submitted as Exhibit D12 from public disclosure. Section 552.107(1) protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See Open Records Decision No. 574 (1990)*. Accordingly, these two classes of information are the only types of information that may be

withheld pursuant to the attorney-client privilege. You do not inform this office that the information at issue consists of a privileged communication between attorney and client. Thus, we conclude that the information at issue may not be withheld from public disclosure under section 552.107.

You also claim section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the policymaking process. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). You do not inform us that the documents in Exhibit D12 are interagency or intra-agency memoranda and letters. Based upon our review of the information at issue, we find that the submitted documents do not contain advice, opinion, or recommendation intended for use in the policymaking process. We conclude, therefore, that section 552.111 is inapplicable to the documents in Exhibit D12.

In summary, with the exception of the information we have marked pursuant to Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503, you must provide the requestor with the information submitted to us for review.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 157597

Enc. Submitted documents

c: Ms. Jeralynn L. Cox
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(w/o enclosures)